Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC(ARB)-25–09 OF 2020
LIZA CHAN JC
10 APRIL 2022

Arbitration — Award — Setting aside — Whether plaintiff applying to set aside arbitral award failed to bring its case within s 37(1) of Arbitration Act 2005 ('the AA') — Whether plaintiff was attempting to re-open and re-litigate issues already determined in the arbitration — Whether High Court would not sit in appeal over arbitral awards which, by their nature, were final and binding on the parties — Section 36(1) of the AA — Whether party attempting to set aside arbitral award had to satisfy high threshold and strictly prove its case fell within any of fact-situations in s 37(1) of the AA — Whether for purpose of setting aside award, court would disregard any complaint falling outside s 37(1) of AA including allegation that award was tainted by errors of law or lack of appreciation of facts

A joint operating agreement ('JOA') entered into between the plaintiff, defendant and two other parties provided that it was to be governed by the laws of India whilst the arbitration agreement in the JOA was to be governed by English law and the venue of arbitration was to be in Kuala Lumpur, Malaysia. Disputes between the plaintiff and defendant were submitted to a three-member arbitral tribunal which, by a majority, decided in favour of the defendant. Dissatisfied with the majority award, the plaintiff applied to set it aside in the instant originating summons ('OS') on the following grounds: (a) the majority erred in applying the Malaysian law on limitation, and not its Indian counterpart, to the dispute to find that the defendant's claims were not time-barred; (b) the majority acted in excess of jurisdiction in deciding that the defendant could charge certain specified costs and expenses to the JOA parties' joint account as well as in deciding that the defendant was entitled under the JOA to be indemnified for amounts that were awarded against it under another arbitral award involving the defendant and a vessel charterer named Samson Maritime Ltd; and (c) the majority's decision that the parties to the arbitration undertake a reconciliation of the cash contributions they had made and the expenditures they had incurred as from 1 August 2011 was not only contrary to the public policy of Malaysia but also in breach of natural justice. In opposing the OS, the defendant argued that the plaintiff had not proven its case under s 37(1) of the Arbitration Act 2005 ('the AA') for the court to set aside the award; that, in reality, the plaintiff was attempting to re-open and re-litigate issues that had already been finally determined by the arbitral tribunal acting within its jurisdiction. The defendant submitted that it was trite that errors of

law or fact in an arbitral award were not grounds for setting it aside. The defendant also submitted that the procedural law of the place where the arbitration was held would govern the arbitration process; hence, the Malaysian law on limitation, being procedural in nature, was applied by the majority of the tribunal to the dispute before it.

Held, dismissing the OS:

(1) Bearing in mind that curial intervention was circumscribed by s 36(1) of the AA on the finality of awards and s 8 of the AA which provided that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', the threshold to set aside an arbitral award was high and the plaintiff had not satisfied that threshold (see para 30(a)).

(2) Whether it was the Malaysian or the Indian law on limitation that applied was a matter for the arbitral tribunal to rule on and therefore the majority of the tribunal could not be said to have exceeded or transgressed the scope of their mandate (see para 30(b)).

(3) The matters raised by the plaintiff were an attempt to re-litigate the issues that had already been argued before the tribunal. Even if the majority of the tribunal had erroneously interpreted articles 17 and 18 of the JOA to apply Malaysian limitation law, this court had no jurisdiction to substitute its own interpretation of the law and facts for the simple reason that applications for setting aside founded on alleged erroneous interpretations of law and fact did not fall within the purview of s 37(1)(a)(iv) and (v) of the AA (see para 30(c)).

(4) It was too late in the day for the plaintiff to say that it was wrong of the majority of the tribunal to have applied the Malaysian law on limitation ('the LA') when, during the arbitration, the plaintiff did not object to the application of the LA to the defendant's claims and the plaintiff had also relied on the LA to contend that its counterclaims in the arbitration were not time-barred. The plaintiff could not now approbate and reprobate and was estopped from taking a contrary stand. In any case, the decision of the majority tribunal on the limitation law that was applicable was not a jurisdictional error but it only went to the admissibility of the claim. Hence, this ground of challenge by the plaintiff failed (see paras 30(e), 30(f) and 34).

(5) The plaintiff's complaints with regard to 'costs chargeable to joint account' and the 'Samson award' claims were issues that were submitted to the arbitral tribunal for determination. Even if the majority tribunal's decision on those issues, based on the interpretation of the JOA, was erroneous, that did not bring the complaints within the purview of s 37

of the AA to set aside the award. The court did not sit as an appellate court to review the merits of the tribunal's decisions on those two issues (see para 37).

(6) The decision of the majority that the parties should undertake a reconciliation of their cash contributions and expenditures was not one that was contrary to public policy in Malaysia or which breached natural justice. In coming to that decision, the majority had expressly stated that they would hear the parties further if the parties could not reach an agreement, hence it was very much a live issue and the plaintiff had every opportunity to present its case. Based on case law, the plaintiff had not met the high threshold to establish breach of public policy. And even if there was any breach of the rules of natural justice, it was not material at all and ought not to taint the whole of the majority award (see para 45).

(7) The whole core and sinew of the plaintiff's complaints were not contemplated by s 37 of the AA. It was trite that the court did not usurp the position of the arbitrator in determining the merits of the dispute. Errors of law or lack of appreciation of the facts were not considerations for setting aside or refusing to recognise arbitral awards. This court found no error in law in the majority award; even if there was any, it was not a ground for setting it aside (see paras 47–49).

[Bahasa Malaysia summary

Perjanjian operasi bersama ('POB') yang dimasukki antara plaintif, defendan dan dua pihak lain dengan syarat bahawa ia akan dikawalselia oleh undang-undang India manakala perjanjian timbang tara dalam POB akan dikawalselia oleh undang-undang Inggeris dan tempat timbang tara hendaklah di Kuala Lumpur, Malaysia. Pertikaian antara plaintif dan defendan telah dikemukakan kepada tribunal timbang tara tiga anggota yang, dengan majoriti, memutuskan yang memihak kepada defendan. Tidak berpuas hati dengan award majoriti tersebut, plaintif memohon untuk mengenepikannya dalam saman pemula semasa ('SP') atas alasan berikut: (a) majoriti terkhilaf dalam menggunakan undang-undang Malaysia mengenai had, dan bukan bertentangan dengan India, bagi dapatan bahawa tuntutan defendan tidak disekat oleh had masa; (b) majoriti bertindak melebihi bidang kuasa dalam memutuskan bahawa defendan boleh mengenakan kos dan perbelanjaan tertentu kepada akaun bersama pihak POB serta dalam memutuskan bahawa defendan berhak di bawah POB untuk menanggung rugi bagi amaun yang telah diawardkan terhadapnya di bawah award timbang tara lain yang melibatkan defendan dan penyewa kapal bernama Samson Maritime Ltd; dan (c) keputusan majoriti bahawa pihak-pihak dalam timbang tara tersebut melakukan penyelarasan bagi sumbangan tunai yang dibuat mereka dan perbelanjaan yang telah mereka keluarkan mulai 1 Ogos 2011 bukan sahaja bertentangan dengan dasar awam Malaysia tetapi juga melanggar keadilan semula jadi. Dalam menentang SP, defendan berhujah bahawa plaintif tidak

membuktikan kesnya di bawah s 37(1) Akta Timbang Tara 2005 ('ATT') untuk mahkamah mengetepikan award; bahawa, pada hakikatnya, plaintif cuba membuka semula dan membicarakan semula isu-isu yang akhirnya telah ditentukan oleh tribunal timbang tara yang bertindak dalam bidang kuasanya. Defendan berhujah bahawa adalah tidak wajar bahawa kekhilafan undang-undang atau fakta dalam award timbang tara bukanlah alasan untuk mengenepikannya. Defendan juga berhujah bahawa undang-undang tatacara tempat timbang tara diadakan akan mengawal proses timbang tara; oleh itu, undang-undang Malaysia mengenai had, yang bersifat prosedural, telah digunakan oleh majoriti tribunal terhadap pertikaian di hadapannya.

Diputuskan, menolak saman pemula:

(1) Dengan mengambilkira bahawa campur tangan membetulkan telah dihadkan oleh s 36(1) ATT mengenai award muktamad dan s 8 ATT yang memperuntukkan bahawa 'tiada mahkamah boleh campur tangan dalam perkara yang dikawal oleh Akta ini, kecuali jika diperuntukkan sedemikian. dalam Akta ini', ambang untuk mengetepikan award timbang tara adalah tinggi dan plaintif tidak memenuhi ambang tersebut (lihat perenggan 30(a)).

(2) Sama ada undang-undang Malaysia atau India mengenai had masa yang digunapakai adalah perkara yang diputuskan oleh tribunal timbang tara dan oleh itu majoriti tribunal tidak boleh dikatakan telah melebihi atau melanggar skop mandat mereka (lihat perenggan 30(b)).

(3) Perkara yang dibangkitkan oleh plaintif adalah percubaan untuk membicarakan semula isu yang telah dihujahkan di hadapan tribunal. Walaupun majoriti tribunal telah tersilap mentafsir artikel 17 dan 18 POB untuk menggunakan undang-undang had masa Malaysia, mahkamah ini tidak mempunyai bidang kuasa untuk menggantikan tafsiran undang-undang dan faktanya sendiri atas alasan mudah bahawa permohonan untuk mengenepikan adalah berdasarkan dakwaan tafsiran undang-undang dan fakta yang khilaf tidak termasuk dalam bidang kuasa s 37(1)(a)(iv) dan (v) ATT (lihat perenggan 30(c)).

(4) Sudah terlalu lewat untuk plaintif mengatakan bahawa majoriti tribunal adalah salah untuk menggunakan undang-undang Malaysia mengenai had masa ('LA') apabila, semasa timbang tara, plaintif tidak membantah permohonan LA untuk tuntutan defendan dan plaintif juga telah bergantung kepada LA untuk menegaskan bahawa tuntutan balasnya dalam timbang tara tidak disekat had masa. Plaintif kini tidak boleh membenarkan dan menolak dan telah dihalang daripada mengambil pendirian yang bertentangan. Walau apapun, keputusan tribunal majoriti mengenai undang-undang had masa yang terpakai bukanlah kesilapan bidang kuasa tetapi ia hanya merujuk kepada kebolehterimaan

tuntutan. Oleh itu, alasan cabaran oleh plaintif ini gagal (lihat perenggan 30(e), 30(f) dan 34).

(5) Aduan plaintif berkenaan dengan 'kos yang boleh dikenakan kepada akaun bersama' dan tuntutan 'Award Samson' adalah isu yang dikemukakan kepada tribunal timbang tara untuk penentuan. Walaupun keputusan tribunal majoriti mengenai isu-isu tersebut, berdasarkan tafsiran POB, adalah salah, ianya tidak membawa aduan dalam bidang kuasa s 37 ATT untuk mengetepikan award. Mahkamah tidak bersidang sebagai mahkamah rayuan untuk mengkaji semula merit keputusan tribunal mengenai dua isu tersebut (lihat perenggan 37).

(6) Keputusan majoriti bahawa pihak-pihak perlu melakukan penyelarasan sumbangan tunai dan perbelanjaan mereka bukanlah keputusan yang bertentangan dengan dasar awam di Malaysia atau yang melanggar keadilan asasi. Dalam membuat keputusan tersebut, majoriti telah menyatakan secara jelas bahawa mereka akan mendengar pihak-pihak dengan lebih lanjut jika pihak-pihak tidak dapat mencapai persetujuan, oleh itu ia adalah isu langsung dan plaintif mempunyai setiap peluang untuk membentangkan kesnya. Berdasarkan undang-undang kes, plaintif tidak memenuhi ambang yang tinggi untuk mewujudkan pelanggaran dasar awam. Dan meskipun sekiranya terdapat sebarang pelanggaran peraturan keadilan semula jadi, ia tidak material sama sekali dan tidak sepatutnya mencemarkan keseluruhan award majoriti (lihat perenggan 45).

(7) Keseluruhan teras dan akar aduan plaintif tidak dipertimbangkan oleh s 37 ATT. Ianya adalah ditetapkan bahawa mahkamah tidak merampas kedudukan penimbang tara dalam menentukan merit pertikaian tersebut. Kekhilafan undang-undang atau kekurangan penghayatan fakta bukanlah pertimbangan untuk mengetepikan atau enggan mengiktiraf award timbang tara. Mahkamah ini mendapati tiada kekhilafan undang-undang dalam award majoriti; walaupun sekiranya ada, ia bukanlah alasan untuk mengetepikannya (lihat perenggan 47-49).]

Cases referred to

ADG and another v ADI and another matter [2014] SGHC 73; [2014] 3 SLR 481, HC (refd)

Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal [2014] 3 MLJ 648, CA (folld)

Aleo Vera of America Inc v Asianic Food (S) PTE Ltd and another [2006] 3 SLR 174, HC (refd)

Allianz General Insurance Company v Virginia Surety Company Labuan Branch [2020] MLJU 331; [2020] 5 CLJ 345, HC (refd)

Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal

[2018] 4 MLJ 799, CA (refd)
BBA and others v BAZ and another appeal [2020] SGCA 53, CA (folld)
Cairn Energy India Pty Ltd & Anor v The Government of India [2009] 6 MLJ 795, CA (refd)
Carr v Gallaway Cook Allan [2014] 1 NZLR 792, SC (refd)
Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, SC (refd)
Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (folld)
Government of India v Petrocon India Ltd [2016] 3 MLJ 435, FC (refd)
Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd [2019] MLJU 1755; [2019] 6 CLJ 588, CA (refd)
Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413; [2019] 1 CLJ 1, FC (refd)
KB v S & Ors [2016] 2 HKC 325 (refd)
Kluang Health Care Sdn Bhd v Lee Yong Beng [2015] MLJU 773, HC (refd)
Majlis Amanah Rakyat v Kausar Corp Sdn Bhd [2009] MLJU 1697, HC (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198; [2020] 9 CLJ 213, FC (refd)
Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1; [2020] 9 CLJ 466, FC (refd)
Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd [2017] SGHC 199, HC (refd)
Quarella SpA v Scelta Marble Australia Pty Ltd [2012] 4 SLR 1057, HC (refd)
SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case [2020] MLJU 2366, HC (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known As Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101, CA (refd)
Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR 86, CA (folld)
Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & Another Case [2016] 4 CLJ 927, HC (refd)
Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] MLJU 1196; [2017] 9 CLJ 273, FC (refd)
The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441, FC (refd)
The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 9(b), 22(2), 30, 30(1), (2), (3), (5), 31, 32, 33, 34, 35, 36, 36(1), 37, 37(1), (1)(a)(iii), (1)(a)(iv), (1)(a)(v), (1)(b)(ii), (2)(b), 42
Limitation Act 1953
Limitation Act 1963 [IN] s 17

Limitation Act 1959 [SG]

Ooi Huey Miin (with Diane Hong) (Raja Darryl & Loh) for the plaintiff.
Avinash Vinayak Pradhan (with Rubini a/p Murugesan, Derrick Leong Tjen Ming and Nur Fathin Amira bt Sapawi) (Christopher & Lee Ong) for the defendant.

Liza Chan JC:

INTRODUCTION

[1] This originating summons ('OS') was filed by the plaintiff against the defendant to set aside a majority arbitral award dated 28 February 2020 ('majority award').

[2] After having read the cause papers, considered the submissions of the parties and heard their oral arguments, I dismissed the OS with costs on 11 February 2020. This judgment contains the full reasons for my decision.

BACKGROUND FACTS

[3] The background facts are culled from the cause papers and submissions of the parties.

[4] The plaintiff, defendant, Tata Petrodyne Ltd ('TPL'), and Oil & Natural Gas Corp Ltd ('ONGC') (collectively, 'the parties') were parties to a joint operating agreement dated 5 December 1995. The JOA was subsequently modified by an addendum agreement dated 19 April 1999 ('JOA').

[5] The JOA was an agreement entered into pursuant to the express requirements of a production sharing contract dated 31 December 1994 ('PSC') between the same parties, and the Government of India.

[6] Pursuant to the PSC, the Government of India as owner of the petroleum resources in the Cauvery Basin, offshore India, specifically identified as Block CY-OS-90/1 ('contract area') granted permission to the parties to conduct 'petroleum operations' in the contract area, with ONGC being the petroleum exploration license holder.

[7] The parties collectively constituted the 'contractor' in the PSC. Under the JOA (and the PSC), the defendant in its capacity as operator for petroleum operations was responsible for the performance of the operating functions of the 'contractor'. The JOA regulates the rights and responsibilities of the parties including the expenditure incurred by the defendant (in its capacity as the

operator) towards operations conducted in the contract area which is required to be shared by the parties in proportion to their respective 'participating interests' in the JOA.

[8] The contract area was shut down in 2011. The defendant claimed expenses were incurred and continued to be incurred by it in the performance of its obligations under the PSC and the JOA and therefore, ONGC, the plaintiff and TPL were bound under the JOA to pay their respective shares towards such expenses, in accordance with their participating interests. A dispute arose with respect to the parties' liability for such expenses.

[9] Article 18.1 provided that the JOA is governed by Indian law. The arbitration agreement in article 17.12 is stated to be governed by English law. The arbitration clause in article 17.12 provided that the venue of arbitration was to be Kuala Lumpur, Malaysia.

[10] The parties' disputes were submitted to arbitration by a tribunal comprising three arbitrators — the late Mr Vinayak Pradhan nominated by the defendant, Justice GS Singhvi (Rtd) from India was nominated by ONGC, the plaintiff and TPL. Professor Lawrence Boo from Singapore was appointed as the third and presiding arbitrator by Justice GS Singhvi (Rtd) and the late Mr Vinayak Pradhan ('tribunal').

[11] A memorandum of issues dated 2 April 2018 comprising 22 issues was settled by the tribunal.

[12] The majority of the tribunal, comprising Professor Lawrence Boo and the late Mr Vinayak Pradhan issued the majority award and found amounts due to the defendant and separately directed that the parties undertake a reconciliation of certain cash contributions and expenditures. The tribunal reserved for itself the jurisdiction to consider any ancillary matter arising out of or following the account reconciliation and make a further award if it deemed necessary. This is referred to in the OS as the 'reconciliation of the 'joint account'.

[13] The dissenting award by Justice GS Singhvi (Rtd) however dismissed the claim on the basis of time bar; and that the defendant was guilty of 'gross negligence' and 'willful misconduct' which disentitled it further from claiming an indemnity under article 4.10(ii) of the JOA.

[14] The plaintiff, dissatisfied with the majority award then filed the present OS to set aside the majority award.

A THE PLAINTIFF'S CASE FOR SETTING ASIDE THE MAJORITY AWARD

[15] The plaintiff's contentions for setting aside the majority award in gist are:

B

(a) the majority of the tribunal decided Malaysian limitation laws and not Indian limitations laws applied to the dispute and found that no part of the defendant's claims were time-barred ('applicable limitation laws decision');

C

(b) the majority of the tribunal in determining that the defendant could charge certain specified costs and expenses to the JOA parties' joint account acted in excess of jurisdiction, rewrote the contract, and exceeded its mandate ('costs chargeable to joint account decision');

D

(c) the majority of the tribunal in making decisions that the defendant was entitled under article 4.10 of the JOA to be 'indemnified' amounts awarded against it by an award in another arbitration involving the defendant and a vessel charterer, Samson Maritime Ltd ('the Samson award') and the JOA parties' liabilities, vis a vis one another acted in excess of jurisdiction ('Samson award decision'); and

E

(d) the directions of the majority of the tribunal that the parties to the arbitration shall undertake a reconciliation of their cash contributions made and the expenditures incurred as from 1 August 2011 is 'contrary to the public policy of Malaysia and was made in breach of natural justice' ('reconciliation decision').

F

[16] The defendant disagreed, and argued that the grounds advanced by the plaintiff to set aside the majority award are without basis; the complaints have nothing to do with the process of the arbitration, or with the jurisdiction of the tribunal; the instant OS proceedings is an attempt to appeal against the majority award by inviting the court to reopen and rehear the merits of the issues that were considered and determined by the majority of the tribunal acting within its jurisdiction.

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[17] I now turn to deal with the plaintiff's complaints.

APPLICABLE LIMITATION LAWS DECISION

I

[18] As the setting aside of the majority award is made under s 37 of the Arbitration Act 2005 ('the AA 2005'), it is produced for ease of reference:

37 Application for setting aside

(1) An award may be set aside by the High Court only if —

(a) the party making the application provides proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the

arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.

[19] On this first ground of challenge, the plaintiff's learned counsel Mr Ooi Huey Miin cited the Federal Court decision delivered by Jeffrey Tan FCJ in *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273 at para 153 that different aspects of an arbitration may be governed by different laws. Learned counsel postulated that:

(a) the applicable limitation laws decision was not decided in accordance with Indian law that was chosen by the parties as applicable to the substance of the dispute. The express choice of Indian law as the governing law to be applied by the tribunal exclude the application of limitation laws of any other state, particularly that of the seat of the arbitration (if not in India). In this regard:

(i) article 18.1 of the JOA provide for the parties substantive rights to be governed by the laws of India;

(ii) article 18.2 of the JOA provides that nothing in the JOA (including the arbitration agreement in article 17) would entitle a party to exercise rights, privileges and powers thereunder in a manner that would contravene Indian law;

(iii) article 17.12 provides that the arbitration agreement is to be governed by English law;

(iv) article 17.9 provided for the incorporation into the arbitration agreement, the UNCITRAL Model Law in so far as it did not conflict with any other parts of article 17;

(v) article 28(1) of the UNCITRAL Model Law provides that the tribunal would decide the parties disputes in arbitration in accordance with the rules of law chosen as applicable to the substance of the dispute ie Indian law; and

(vi) article 28(4) of the UNCITRAL Model Law provides that the tribunal would, in all cases, decide in accordance with the terms of the contract between the parties (be it the JOA or the arbitration agreement in article 17).

(b) in deciding that the limitation laws of Malaysia (rather than the limitation laws of India) applied to the claims of the claimant in the arbitration, the majority of the tribunal incorrectly interpreted article 17 and article 18 of the JOA;

(c) the majority of the tribunal in deciding whether limitation applies as a matter of procedural law, would be answered by the law of the seat of the arbitration was wrong as under Indian law, limitation periods are a matter of substantive rights and not procedural law;

(d) in applying Malaysian limitation laws to the exclusion of Indian limitation laws in deciding the dispute, the majority of the tribunal has acted in excess of its mandate and exceeded the scope of submission to the arbitration under s 37(1)(a)(v) of the AA 2005 and contrary to public policy under s 37(1)(b)(ii) of the AA 2005;

(e) the applicable limitation laws decision contravenes the mandatory provisions of ss 30(1), 30(2) and 30(5) of the AA 2005:

(i) s 30(1) of the AA 2005 reads:

> The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.

(ii) s 30(3) of the AA 2005 reads:

> (3) Any designation by the parties of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(iii) s 30(5) of the AA 2005 reads:

> The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction.

(f) the majority of the tribunal decided on claims that would have been time-barred under Indian limitation laws and drew attention of this court to the recent Singapore case of *BBA and others v BAZ and another appeal* [2020] SGCA 53 where in that case:

(i) the governing law of the underlying agreement was Indian law and the place of arbitration designated in the arbitration clauseause was Singapore;

(ii) the claim of time bar in the arbitration was made and decided on by applying the Indian Limitation Act 1963 ie Indian law or the governing/substantive law in that arbitration;

(iii) the challenge by the dissatisfied party was in relation to the factual

finding by the arbitral tribunal that the claim was not time-barred under s 17 of the Indian Limitation Act 1963; and

(iv) there was no question in that case, that the Indian limitation laws, and not Singapore limitation laws were the correct limitation laws to be applied by the arbitral tribunal in deciding the dispute referred.

[20] Mr Avinash Pradhan, learned counsel for the defendant stated the legal position as follows before dealing with the plaintiff's contentions:

(a) the law does not countenance appeals against arbitration awards:

(i) it is trite law that courts in jurisdictions that adopt the Model Law do not have the right to review the merits or correctness of an arbitral tribunal's decision. As such the Malaysian courts must not sit in appeal over the arbitral tribunal's decision;

(ii) it is also a well-established general rule that an arbitral tribunal's decision is final and binding on the parties and any errors of law or fact made by the arbitral tribunal may not be appealed against;

(iii) the rationale for this principle is that the parties have agreed to have their disputes resolved by an arbitral tribunal rather than a court of law and consequently, they have agreed to abide by the decision of that tribunal irrespective of whether the decision made is a right or wrong one. As illustrations, see *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213 (FC) at para 54; *Allianz General Insurance Company v Virginia Surety Company Labuan Branch* [2020] MLJU 331; [2020] 5 CLJ 345 (HC) at paras 32 and 58; *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & another case* [2016] 4 CLJ 927 (HC) at paras 43–47;

(iv) s 36(1) of the AA 2005 very clearly stipulates that the award delivered by an arbitral tribunal 'shall be final and binding on the parties ...; and

(v) the plaintiff's allegations vide the OS are nothing but an impermissible attempt at an appeal against the majority award (as opposed to a legitimate challenge to the majority award on the specific and limited grounds provided for under the AA 2005, by inviting this honourable court to reopen and rehear the merits of the issues that were considered and determined by the majority of the tribunal acting within its jurisdiction.

(b) non-compliance with s 30 of the AA 2005 does not afford a ground to set aside an award:

(i) at para 43 of *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd &*

Another Case [2016] 4 CLJ 927 (HC), the court applied the decision in *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149 (HC) in holding that the provisions of s 30 of the AA 2005 does not provide an independent ground on which an arbitral award may be set aside;

(ii) at para 141 of *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1; [2020] 9 CLJ 466 (FC), it was held that the court cannot set aside an arbitral award for reasons other than those that are listed in s 37 of the AA 2005;

(iii) other jurisdictions have similarly held the position that article 34 of the Model Law (upon which s 37 of the AA 2005 is based) sets out an exhaustive list of grounds upon which an award may be set aside (see *Carr v Gallaway Cook Allan* [2014] 1 NZLR 792 (SC NZ) at para 76, *ADG and another v ADI and another matter* [2014] SGHC 73; [2014] 3 SLR 481 (HC SG) at para 97 and *KB v S & Ors* [2016] 2 HKC 325 *(CFI HK)* at para 22;

(iv) therefore, it is submitted that this court's consideration of the OS herein must be strictly confined to the grounds that the plaintiff has relied upon vis a vis s 37 of the AA 2005. All other grounds which are not set out in s 37 of the AA 2005 should be disregarded;

(v) s 30 clearly does not entail that a misapplication of the law by the majority of the tribunal, or indeed, the application of the wrong law, are jurisdictional errors. Indeed, to suggest otherwise denudes the principle of non-appealability of any meaning. As illustrations, in (i) *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199 (HC SG) (at paras 13–19) a case concerned with an application for enforcement of a foreign arbitral award. The main issue was whether the arbitral tribunal exceeded its jurisdiction if it made an error as to the governing law of the contract. The court held that it did not:

> [a]n arbitral tribunal does not exceed its jurisdiction just becomes it comes to a wrong conclusion on an issue that was within the scope of the submission to arbitration. There is no reason why an issue as to governing law should be treated differently from other issues submitted to arbitration.

(vi) the case of *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199 (HC SG) which followed the decision in *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 (HC SG), was concerned with a dispute regarding a distributorship agreement for stone products. The agreement provided that it would be 'governed by the Uniform Law for International Sales under the United Nations

Convention of April 11, 1980 (Vienna) and where not applicable by Italian law'. Before the arbitral tribunal, Quarella's position had been that the Convention applied as the governing law, while Scelta had taken the position that Italian law was applicable. The tribunal agreed with Scelta. In applying to set aside the order for enforcement of the award, Quarella argued that the tribunal had exceeded its jurisdiction. Judith Prakash J (as she then was) held:

> [31] It is useful, at this juncture, to set out some of the legal principles underlying the application of art 34(2)(a)(iii) of the Model Law. First, art 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine ... Art 34(2)(a)(iii) addresses the situation where the arbitral tribunal exceeded (or failed to exercise) the authority that the parties granted to it (see Gary B Born, *International Commercial arbitration* (Wolters Kluwer, 2009) at Vol 2, pp 2606–2607 and 2798–2799). This ground for setting aside an arbitral award covers only an arbitral tribunal's substantive jurisdiction and does not extend to procedural matters (see Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ('Singapore Arbitration Legislation') at p 117).
>
> ...
>
> [33] Third, it is *trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award* under art 34(2)(a)(iii) of the Model Law (see *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [19]–[22]) ... art 34(2)(a)(iii) of the Model Law applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute (see above at [31]).
>
> ...
>
> [53] The first and third principles are what I applied to this case. With regard to the first principle, on the facts before me, this was not a case where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. *The issue of the applicable law was submitted to the tribunal; the Award addressed this explicitly (at para 48 of the Award). The tribunal did decide the matters that were submitted to it.*
>
> [54] With regard to the third principle, besides examining the guidance set out by the Court of Appeal in the excerpts above, Quarella would not have had to venture too far to find literature that would have indicated that the prospects of it succeeding in the setting aside application on this ground were dim. A recently published monograph by Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) states (at para 6.127):

> *An issue that is within the scope of submission to arbitration does not go outside the scope simply because the arbitral tribunal comes to a wrong conclusion on it.* Unless the award contained decisions beyond the scope of the arbitration agreement, an error in interpreting the contract does not permit setting aside under art 34(2)(a)(iii) of the Model Law 1985. *Neither would an argument that the tribunal applied the wrong governing law constitute a ground for setting aside an award.* (Emphasis added.)
>
> [55] *Quarella 's attempt to set aside the Award under Art 34(2)(a)(iii) was based entirely on a disagreement with the interpretation the tribunal took regarding the choice of law cl. The dispute was not one that engaged Art 34(2)(a)(iii) of the Model Law.*

[21] The defendant's learned counsel submitted that:

(a) the applicable limitation laws decision was not a decision on matters beyond the scope of submission to the arbitration as these issues were at all material times submitted to the tribunal for determination at paras 1 and 11 of the amended memorandum of as follows:

> 1. To ascertain the applicable statutory law on limitation of action, viz. whether the Malaysian Limitation Act or the Indian Limitation Act applies.
>
> ...
>
> 11. Whether any of the claims raised by the claimant are barred by statutory time limitation.

(b) para 9.1 of the plaintiff's affidavit in reply in fact shows, the plaintiff has also admitted that these issues culminating in the applicable limitation laws decision were submitted to the tribunal for determination;

(c) as such there is no basis for the plaintiff to rely on s 37(1)(a)(v) of the AA 2005 and contend that the applicable limitation laws decision was a decision on matters beyond the scope of the submission to the arbitration, citing *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149 (HC), at para 136–137:

> [136] Justice Judith Prakash examined how the Court of Appeal in *PT Asuransi* had applied Lord Halsbury's test as set out above to determine *whether a particular issue (the June 2001 meeting) was within the jurisdiction of the tribunal* ... Further, the Court of Appeal had held that the court was required to enter two separate but related enquiries:
>
> > ... first, the ascertainment of the matters that were within the scope of submission to the second tribunal; and second, whether the second and third critical findings involved such matters.
> >
> > 34 Cumulatively, these passages from *PT Asuransi* make it clear that *the correct approach to be adopted, in response to a claim that an arbitral award*

(or part thereof) was not within the scope of submission to arbitration, is for the court to ascertain:

the matters which were within the scope of submission to the arbitral tribunals; and

whether the arbitral award (or the part being impugned) involved such matters, or whether it was a 'new difference' which would have been 'irrelevant to the issues requiring determination' by the arbitral tribunal.

[137] *Therefore, in the exercise of discretion, the court will have to ascertain what matters were within the scope of submission to arbitration; and whether the award involved new difference or such matters which would have been irrelevant to the issues requiring determination by the arbitral tribunal.* In ascertaining these matters, again, I agree with the defendants that some guidance may be gained from *Lesotho*, which although was a case under s 68 of the English Arbitration Act of 1996 does not alter or reduce its persuasiveness and relevance on this aspect:

> 32. In order to decide whether s 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. *In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under* s 68(2)(b). (Emphasis added.)

(d) in reality the plaintiff's objection to the applicable limitation laws decision is an attempt by the plaintiff to revisit the decision of the majority of the tribunal by contending that the majority of the tribunal incorrectly interpreted article 17 and article 18 of the JOA in deciding that the limitation laws of Malaysia (rather than the limitation laws of India) applied to the claims of the claimant in the arbitration;

(e) such an objection regarding the majority of the tribunal's contractual interpretation of the JOA does not engage this honourable court's intervention under s 37(1)(a)(v) of the AA 2005, regardless of whether the majority of the tribunal's contractual interpretation may have been incorrect (which in any event is denied) citing in support:

(i) *Cairn Energy India Pty Ltd & Anor v The Government of India* [2009] 6 MLJ 795 (CA) at paras 24 and 45–46:

> [24] *There was nothing improper for the majority arbitrators to have been persuaded by the construction of the appellants, and could not be said to have acted so erroneously that a court must set aside that finding. It was just a question of the arbitrators choosing one reasonable construction over the other. It cannot be overly emphasized that a difference of opinion in the construction of the facts and provisions, and in light of the majority arbitrators' plausible conclusion, is insufficient ground to conclude that a*

manifest error of law had been established, which allegedly had caused an error on the face of the award.

...

[45] *There could be no doubt that as against the construction by the arbitral tribunal, the court below had a different construction. So evidently, therefore, the court below had treated the application before it as an appeal.*

[46] *But even if the issue before the court below were a question of mixed fact and law, it was still not open to the court below to reopen the issue, and or to construct the PSC* (see *Pembinaan LCL Sdn Bhd v SK Styroform and Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*). The court below had no appellate powers. If it were a question of mixed fact and law, it was only open to the court below to determine whether there was error of law on the face of the award. *The court below identified an error of construction as the error of law. But an error of construction is not a sufficient ground to set aside the award* (*Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* citing *Worsdell v Holden* 1 LT 14). (Emphasis added.)

(ii) *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & Another Case* [2016] 4 CLJ 927 (HC) at paras 43–47.

[22] The defendant's learned counsel then argued that the plaintiff's reliance on s 30(1), 30(2) and 30(5) of the AA 2005 is completely unfounded as:

(a) the plaintiff can only rely on grounds set out in s 37 of the AA 2005 to set aside the majority award citing the following cases in support:

(i) at para 43 in *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & Another Case* [2016] 4 CLJ 927 (HC), the court applied the decision in *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149 (HC):

(a) ss 30(2) and (5) of the AA 2005 *are not independent grounds on which the arbitral award may be set aside;* the reason being *the grounds for setting aside an arbitral award are limited to those found in s 37 of the AA 2005. This is in fact apparent from a plain reading of the statute itself, ie, the opening words of s 37 that an award may be set aside by the High Court only if …* (Emphasis added.)

(1) in *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1; [2020] 9 CLJ 466 (FC) it was held at para 141 that:

It must be remembered that the grounds enumerated in s 37 are exhaustive and as such the court cannot set aside an award for reasons other than those that are listed.

(2) in *Carr v Gallaway Cook Allan* [2014] 1 NZLR 792('SC NZ') it

was held at para 76 that:

> [76] art 34 provides for a limited exception to the finality of arbitral awards. It sets out an exhaustive list of the grounds upon which an award may be set aside ...

(3) *ADG and another v ADI and another matter* [2014] SGHC 73; [2014] 3 SLR 481 (HC SG) at para 97.

(ii) *KB v S & ORS* [2016] 2 HKC 325 ('CFI HK') at para 22.

(b) s 30(2) of the AA 2005 has been deleted by s 9(b) of the Arbitration (Amendment) (No 2) Act 2018. Notwithstanding the deletion of s 30(2) of the AA 2005, the defendant proceeds on the basis that this provision applies to these proceedings.

[23] Learned counsel for the defendant further posited that the attempt by the plaintiff to link s 30–s 37 of the AA 2005 is clearly misconceived as a matter of law. The majority award does not ignore the parties' choice of law. Rather, the majority award makes clear that: (i) the majority of the tribunal considered that the limitation period is a procedural issue governed by the law of the seat of arbitration; and (ii) that the majority of the tribunal considered the question of the seat of arbitration in light of the parties' submissions and found that the seat of arbitration was Kuala Lumpur, Malaysia. The majority of the tribunal's determination in this latter regard is entirely consistent with the powers of the tribunal to determine the seat of the arbitration pursuant to art 20 of the Model Law (incorporated into the JOA by article 17.9 of the JOA) and s 22(2) of the AA 2005.

[24] The defendant submitted that the applicable limitation laws decision was entirely correct:

(a) where an international commercial contract contains an agreement to resolve disputes by arbitration, at least three systems of national law are engaged when a dispute occurs. The UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (SC UK) explained, at para 1, that these different systems of national law are as follows:

> They are: the law governing the substance of the dispute; the law governing the agreement to arbitrate; and the law governing the arbitration process. The law governing the substance of the dispute is generally the law applicable to the contract from which the dispute has arisen. *The law governing the arbitration process (sometimes referred to as the 'curial law') is generally the law of the 'seat' of the arbitration, which is usually the place chosen for the arbitration in the arbitration agreement.* These two systems of law may differ from each other. Each may also differ from the law which governs the validity and scope of the arbitration agreement. (Emphasis added.)

(b) in the majority award, it was determined that the seat of the arbitration is Kuala Lumpur, Malaysia. That determination is clearly in full accord with Malaysian law, in light of article 17.12 of the JOA, which provides for Kuala Lumpur, as the 'venue' of the arbitration. In *Government of India v Petrocon India Ltd* [2016] 3 MLJ 435 (FC), the Federal Court discussed a similar provision:

> [36] In the present case the venue of arbitration as stated in cl 34.12 being Kuala Lumpur, Malaysia, while the law governing arbitration agreement is English law. There is no provision for seat of arbitration as such. *In the circumstances, could Kuala Lumpur which is named as the venue of arbitration be deemed to be the seat of the arbitration? We are of the view that there is a strong support for that proposition for the following reasons. Firstly, if the word 'venue' in cl 34.12 is merely a reference to the geographical or physical seat as held by the Court of Appeal, it would not have been necessary to have it inserted in the agreement because the geographical seat may be changed at any time at the convenience of the parties. Since the parties had expressly named Kuala Lumpur as the 'venue' we are inclined to the view that the word 'venue' in the present context must be construed to mean 'seat'*. (Emphasis added.)

(c) as the seat of the arbitration was Kuala Lumpur, Malaysia, it is trite that the applicable procedural law of the arbitration was Malaysian law. This appears to be accepted by the plaintiff in para 9.7, of its affidavit in reply. It is also trite that limitation laws are procedural laws and not substantive laws. The following passage from *Arbitration In Malaysia A Practical Guide* (2017, Sweet & Maxwell) is instructive [7.083]:

> Statutes of limitation which merely bar the enforcement of a right by action, such as Malaysian limitation laws, are generally considered purely procedural laws and are thus tied to Malaysian curial law. In this respect, where Malaysia is selected as the seat of arbitration, the statutory time limit of the Limitation Act 1953 applies to any arbitration in Malaysia even where the substantive law applicable to the dispute is not the law of Malaysia.

(d) following the above, the question of which limitation laws applied to the defendant's claims in the arbitration was to be determined in accordance with the applicable procedural law of the arbitration. Therefore, the applicable limitation laws decision was entirely correct.

[25] The defendant further submitted that even if wrong, the applicable limitation laws decision is not in conflict with the public policy of Malaysia based on the principles set out by various cases in interpreting s 37(1)(b)(ii) of the AA 2005 vis a vis, public policy:

(a) *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413; [2019] 1 CLJ 1 (FC) at paras 53 and 55:

> [53] The decision of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR 597, *provides a good*

guidance on the interpretation of the term 'public policy' in an application to set aside an arbitral award made by a tribunal, on the ground of a breach of the rule of natural justice for being in conflict with the public policy. In that case Chan Sek Keong CJ (delivering the judgment of the court) ruled:

> *Although the concept of public policy of the state is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience'* (see Downer Connect (58) at (136), or *is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public' (see Deutsche Schachbau v. Shell International Petroleum Co Ltd* [1987] 2 Lloyds Rep 246 at p 254, per Sir John Donaldson MR), *or where it violates the forum's most basic notion of morality and justice:* (see *Parsons & Whittemore Overseas Co Inc v Societe Generalede L'lndustrie du Papier (RAKTA)* 508 F 2d 969 (second Cir, 1974) at p 974).
>
> …
>
> *But in applying the concept for the purpose of setting aside an award under* s 37 of the AA 2005*, the concept of public policy ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia.* As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree): *The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused.* (Emphasis added.)

(b) *Allianz General Insurance Company v Virginia Surety Company Labuan Branch* [2020] MLJU 331; [2020] 5 CLJ 345 (HC):

> [39] This court adopts the defendant's summary of the three principles laid down in *Sigur Ros* which can be distilled to be the following:
>
> (i) *the conflict with public policy ground that is envisaged in* s 37(1)(b)(ii) *ought to be narrowly and more restrictively read. The court's curial intervention should be sparingly used*, and this would be in keeping with the terms in s 8 of the Act;
>
> (ii) *the threshold to be met is somewhat high in that by its very nature, 'it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach'.* The court should be compelled to agree that the award conflicts with public policy; and
>
> (iii) *an arbitral award will not be set aside merely because it is irrational or unreasonable. The concept of public policy must be one taken in the 'higher sense, where some fundamental principle of law and justice is engaged, some element of illegality, where enforcement of the award involved clear injury to public good or the integrity of the court's process and powers will*

thereby be abused'.(Emphasis added.)

(c) *Kluang Health Care Sdn Bhd v Lee Yong Beng* [2015] MLJU 773 (HC):

> [35] In the same decision of *Government of India v Cairn Energy India Pty Limited & Ors*, I had also considered the allegation of breach of public policy; what it means and what an applicant has to show in order to successfully rely on this ground to set aside an award. From para 140 of the judgment, I had opined:
>
> > [140] *The plaintiff has also relied on subparagraph 37(1)(b)(ii) as a ground to setting aside the award, and that is, the award is said to be in conflict with the public policy of Malaysia.*
> >
> > [141] Model Law recognizes that each State has its own concept of what is required of 'public policy'. Nevertheless, it may be said that since subparagraph 37(1)(b)(ii) is subject to the same overlying conditions as subparagraphs 37(1)(a)(iv) and (v), and that is it is discretionary, having regard to the context of the dispute, that it arises out of commercial and contractual transactions where parties have received more than adequate advice, including legal counsel; and that bargains are arms' length, the public policy that is envisaged in this provision must be read narrowly and more restrictively.
> >
> > [142] Although there appears to be no requirement of 'proof' in this subparagraph, and whilst the question of what amounts to 'public policy' may be a difficult one, I would also venture to say that *the court nevertheless requires sufficient basis for such allegation or ground in order that it may 'find' that 'the award is in conflict with the public policy of Malaysia'. This requirement extends to not only identifying the particular public policy of Malaysia which is said to be conflicted but also to providing basis of the alleged conflict; that is how it is conflicted or breached; and how the breach has prejudiced the rights of the plaintiff.*
> >
> > [143] *This makes the threshold high in that by its very nature, it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach or conflict with the public policy of Malaysia court. From the reasons offered, the court must be compelled to agree or that a strong case has been made out that the award conflicts with the public policy of Malaysia. Otherwise, the contractual arrangements of the parties must be maintained. These views were expressed in Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 and *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 *at p 565, 570, and I agree that it should be the case here.*
> >
> > ...
> >
> > [152] It is clear that while subs 37(2) serves to provide some examples of what may be considered as conflicting with the public policy of Malaysia; and it would be those awards which were induced or affected by fraud or corruption; or where there is a breach of natural justice, as is the case with proper statutory interpretation, any other complaint of conflict with

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> public policy must fall within this genre as set out in paras 37(2)(a) and (b). Quite undisputedly, these two areas may be said to fall within the basic and fundamental notions or principles of justice. (Emphasis added.)

(d) s 37(1)(b)(ii) of the AA 2005 as such, only applies in very limited circumstances. The plaintiff's objection to the applicable limitation laws decision fails to meet this high threshold.

[26] It was also submitted that in reality, the plaintiff's objection to the applicable limitation laws decision is in essence once again an objection to the contractual interpretation of the JOA by the majority of the tribunal which does not engage this court's intervention under s 37(1)(b)(ii) of the AA 2005. The following authorities which lay down the proposition that an issue of contractual interpretation cannot amount to a breach of public policy were relied on:

(a) *Kluang Health Care Sdn Bhd v Lee Yong Beng* [2015] MLJU 773 (HC) where it was held at paras 35–37 that:

> [35] In the same decision of *Government of India v Cairn Energy India Pty Limited & Ors, I had also considered the allegation of breach of public policy; what it means and what an applicant has to show in order to successfully rely on this ground to set aside an award* ...
>
> [36] There is absolutely no allegation or evidence of any fraud, corruption or breach of natural justice which may be said to fall within the conflict with public policy of Malaysia ground. *All that the court hears is the applicant's dissatisfaction with the manner in which the Arbitrator construed and interpreted the sub-contractual terms and obligations; that such construction and interpretation was apparently contrary to the clear terms of the subcontracts and read not in the applicant's favour.*
>
> [37] *Such an argument is hardly enough to count as meeting the high thresholds set in* s 37. (Emphasis added.)

(b) *SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case* [2020] MLJU 2366 (HC) where it was held at paras 86 and 89–90 that:

> [86] *I have scrutinised IRDA's Defence and Written Submissions at the arbitration and I find that it is only in the latter that IRDA had raised the argument on public policy by relating it to cll 8, 27 and 28 in the Contract on 'Detailed Working Drawings', 'Variations' and 'Valuation of Variations' respectively and contending that if SJIC Bina's interpretation of the standard form government contract is accepted, then (i) any contractor under a similar contract will have the right to omit items and change the design as and when they please; and (ii) contractors would be encouraged to tender based on a design that will most likely secure the most lucrative award when in actual fact, a cheaper design will be constructed.*

> [89] *Thus, it cannot be said that the Arbitrator had disregarded the contractual provisions and the conduct of the parties regarding the Design Change so as to justify the setting aside of the Award on the ground of breach of public policy*.
>
> [90] Moreover, based on the averments in the affidavits and its submissions in this court, *IRDA has not fulfilled the threshold test as laid down in Jan de Nul* as explained earlier, a decision which strikingly is not included in IRDA's list of case authorities. (Emphasis added.)

[27] The defendant's learned counsel further postulated that even if the majority of the tribunal's contractual interpretation was incorrect (which is denied), this court has no jurisdiction to visit the correctness of the majority of the tribunal's decision. To do so would be akin to an appeal and relied on the following non-exhaustive authorities:

(a) *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213 (FC):

> *As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process. The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. Bearing in mind the two primary objectives of the Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), the courts do not review the merits of the arbitral tribunal's decision.* (Emphasis added.)

(b) *Allianz General Insurance Company v Virginia Surety Company Labuan Branch* [2020] MLJU 331; [2020] 5 CLJ 345 (HC):

> [32] In *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488, Sundaresh Menon CJ outlined the common arguments that are usually advanced when contending a breach of natural justice. His Lordship held as follows:
>
> > [39] *In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the real nature of the complaint …*
> >
> > [58] *section 37 is not an appellate provision; the court must not sit in appeal over the view of the arbitrator by re-examining and re- assessing the materials before him as laid down in the Court of Appeal case of Antara Steel Mills Sdn Bhd v CIMB Insurance Brokers Sdn Bhd* [2015] 6 MLJ 248; [2015] 5 CLJ 1018. (Emphasis added.)

(c) *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & Another Case* [2016] 4 CLJ 927 (HC) at paras 43–47:

(a) The Malaysian courts have declined to follow the Indian approach: in *Infineon*, the High Court described the *Saw Pipes*'s case as embodying the 'extreme approach' (572 [74]) and *Cairn Energy* where Mary J considered the *Saw Pipes*'s case and preferred to follow the approach in *PT Asuransi*; the reasoning adopted by the Singapore Court of Appeal in *PT Asuransi* for rejecting the Indian approach is found in 192 [163] of *Cairn Energy* as follows:

> 57. While we have the greatest respect for the Supreme Court of India, we do not think that the reasoning in that decision is applicable to the Indian Act reflected in the Indian decision is not reflected in the [Singapore International arbitration Act] which, in contrast, *gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under* s 24 of the Act and art 34 *of the Model Law*. While we accept that an arbitral award is final and binding on the parties under s 19B of the Act, we are of the view that the Act will be internally inconsistent if the public policy provision in art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. *In the present context, errors of law or fact, per se, do not engage the public policy of Singapore under art 34(2)(b)(ii) of the Model Law when they cannot be set aside under art 34(2)(a)(iii) of the Model Law.*

(c) The Indian approach is also not compatible with the *policy of the Malaysian courts of minimal curial intervention* as articulated by David Wong Dak Wah JCA (on behalf of the Court of Appeal) in the recent decision (8 July 2015) of *The Government of India v Cairn Energy India Pty Limited & 2 Ors* (Dalam Mahkamah Rayuan, Malaysia (Appeal Jurisdiction) Rayuan Sivil/Rayuan No. W-02(NCC)(A)-2404–10–2012) at paras [22], [23], [37] and [38] as follows:

> 22. *Further the law is crystal clear in that even if the arbitral tribunal was wrong in its interpretation of the terms in the PSC, it is not a ground for court's intervention. That is the philosophy behind Arbitration Act 2005. The simple rationale behind this philosophy is that the parties have agreed to have their disputes settled or resolved by an arbitral tribunal rather than the court of law and with that agreement, they have also agreed to abide by the decision of that tribunal irrespective whether the same is correct or not. The window of opportunity for court's intervention is for all intents and purpose closed save and except when the arbitral tribunal had exceeded its jurisdiction.* We see no 'rewriting' of the PSC. It was only a pure and simple exercise in construction of an agreement between contracting parties.
>
> ...
>
> 37. *It is our view that courts must continue to keep 'hands off' attitude when*

dealing with arbitral award for the simple reason that there is an express agreement between the parties that they prefer that their disputes to be resolved by an arbitral tribunal and not within the judicial system. Whatever the parties' reasons for such preference is of no concern to the courts. As in all commercial agreements, courts must give effect to or respect to parties' intentions.

[47] Seen in the light of the authorities alluded to before (eg CRW Joint, Perwira Bintang Holdings, AJWA, Intelek Timur, Cairn Energy India (CA 2009), Cairn Energy (CA 2015)) taken at its highest, *even it can be argued that the majority tribunal erred in law in deciding that the deed of commitments was the relevant agreement to determine liability for the fire incident and not applying cl 13.4 of the storage agreement to limit liability to Trafigura for the fire incident, it is beyond doubt that an error of law is not sufficient ground justifying the setting aside of an arbitral award under s 37 of the AA 2005*. (Emphasis added.)

(d) s 36(1) of the AA 2005 which provides that the award is final and binding on the parties.

[28] The defendant highlighted that international comity leans towards upholding international arbitration awards:

(a) the relationship between public policy and international comity was explained in the case of *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] MLJU 1697 (HC) at pp 24-26, where after an extensive reference to commentaries and Commonwealth decisions, the court held that:

Thus, from the above sample of learned commentaries it would appear that the arbitral law on conflict with public policy means more than just a non-compliance with domestic law. In other words, it cannot mean a mere conflict with domestic law, but must be one which descends into the area of public policy of the domestic jurisdiction in a serious way. The comparative case law in this area support such a limited view of the concept of public policy.

See also the Singapore High Court decision in *Aleo Vera of America Inc v Asianic Food (S) PTE Ltd and another* [2006] 3 SLR 174, where Judith Prakash J stated (at p 16 of the report):

... *the principle of international comity enshrined in the convention ... strongly inclines the courts to give effect to foreign arbitration awards*. As Litton PJ observed in the decision of the Hong Kong court of Final Appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* ... *woven into the concept of public policy as it applies to the enforcement of foreign arbitration award 'is the principle that courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice*.

...

> *These leading cases in Hong Kong and Singapore, which themselves draw on decisions from other Commonwealth jurisdictions and the United States, relate to the enforcement of foreign arbitral awards. In these cases, the approach is not to refuse to register on the ground of conflict of public policy unless the most basic notions of morality and justice would be offended.*
>
> *Thus the approach is very restrictive, being grounded in the upholding of international comity.*
>
> *In my view, the Malaysian courts cannot surely ignore the above comparative jurisprudence in the interests of maintaining comity of nations and a uniform approach to the model law, so far as that is possible, to the concept of 'public policy' in relation to foreign awards … the defendant would need to proceed further to establish the conflict with the public policy of Malaysia in the narrow sense of something offending basic notions of morality and justice or something clearly injurious to the public good in Malaysia.* I was of the opinion this threshold was not satisfied by the defendant on the facts of this case. (Emphasis added.)

(b) relying on the aforesaid authority, it is submitted that the doctrine of international comity does not assist the plaintiff's case. On the contrary, the doctrine of international comity strongly inclines the courts to give effect to foreign awards and requires more compelling reasons to be present before a foreign award (as compared to a challenge to a domestic award) can be challenged on the grounds of public policy.

(c) in this OS, the plaintiff seeks to challenge the majority award which was given in the course of an international arbitration, rather than a domestic arbitration. Therefore, the doctrine of international comity should be viewed in favour of giving effect to the majority award rather than it being used as a basis to set aside the majority award.

[29] Finally, the defendant's counsel argued that the case of *BBA and others v BAZ and another appeal* [2020] SGCA 53 (CA SG), relied on by the plaintiff, does not support its case. On the contrary, the case actually supports the defendant's case.

THE COURT'S FINDING

[30] On this complainant based on the applicable limitation laws decision, I find that Mr Avinash Pradhan, learned counsel for the defendant had set out the facts and the relevant authorities in depth. I find myself to be in complete agreement with him on his analysis of the authorities, and am persuaded that on the facts, the law, and the clarity of reasons given by him, that this plaintiff's ground of setting aside of this aspect of the majority award falls. I do not, on my part think it necessary to burden this judgment with a repetition of the submissions except to add that:

(a) bearing in mind curial intervention is circumscribed by s 36(1) AA 2005

on the finality of awards and s 8 of the AA 2005 which provides that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', the threshold to set aside an arbitral award is high. The plaintiff in my utmost respectful view has not satisfied the threshold;

(b) I find whether Malaysian laws of limitation or Indian laws of limitation apply is a matter for the tribunal to rule on as contained in the amended MOI and therefore the majority of the tribunal cannot be said to have exceeded or transgressed the scope of the mandate referred to them;

(c) the matters raised by the plaintiff before this court is an attempt to relitigate the issue already argued before the tribunal. Even IF assuming for one moment the majority tribunal erroneously interpreted article 17 and 18 of the JOA to apply Malaysian laws of limitation, this court has no jurisdiction to substitute its own interpretation of the law and facts for the simple reason that applications for setting aside purportedly founded on erroneous interpretations of law and fact do not fall within the purview of s 37(1)(a)(iv) and (v) of the AA 2005 — *Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd* [2019] MLJU 1755; [2019] 6 CLJ 588;

(d) I fail to see how the arguments raised by the plaintiff can constitute a breach of Malaysia's public policy within the strict principles as discussed in the authorities produced by the defendant;

(e) the very fact that the plaintiff in the arbitration did not object to the Malaysian Limitation Act 1953 being the limitation law applicable to the defendant's claims on the basis that they were part of the procedural law that followed the *lex arbitri*, and, the plaintiff having also relied on the Malaysian Limitation Act 1953 to contend that its counterclaims in the arbitration were not time-barred, in my respectful view puts the plaintiff 'beyond the point of no-return' on the majority of the tribunal's decision that Malaysian limitation laws apply. Such an objection raised in the instant proceedings is simply too late in the day. To find otherwise will effectively give the plaintiff a second bite of the proverbial cherry. Not only that, estoppel also applies as made clear by two cases urged upon this court by the defendant:

(i) *Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal* [2014] 3 MLJ 648 (CA) where it was held, at paras 30(b) to (d), that:

> (b) *the respondent, in this case, raised the objection as to the jurisdiction of the arbitral tribunal for the first time at the High Court in Malaysia when the appellant sought recognition or enforcement of the award by the arbitral tribunal.* Given that arbitral tribunal proceedings are not informal proceedings, but are undertaken by parties with the clear intention of

A obtaining a decision that settles the dispute between the parties, parties cannot be unaware if the arbitral tribunal lacks jurisdiction because jurisdiction is conferred by the parties;

(c) yet no explanation was given for the failure to *object to jurisdiction before the arbitral tribunal, particularly since English law would require the respondent to have made the objections as to jurisdiction before the arbitral tribunal or lose the right to make the objection. The objection made only after having participated fully in the arbitration at all times, and even then only when the appellant sought recognition or enforcement of the award by the High Court suggests the respondent took part in the proceedings before the arbitral tribunal while keeping it up its sleeve the objection as to jurisdiction to be used to challenge the award if the award went against it*. We agree with the description in *Rustall Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 that *this is a fundamental principle of objection. A party cannot seek to have its cake and at the same time eat it too* and

(d) furthermore, the fact of *failure to object at the proceedings before the arbitral tribunal and thus causing all parties to act on the basis the respondent accepted that the arbitral tribunal had jurisdiction or scope certainly does not commend itself to an exercise of discretion in favour of the respondent to refuse recognition or enforcement of the award. It calls properly for the application of the doctrine of estoppel* as enunciated in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331 (FC). (Emphasis added.)

(ii) *BBA and others v BAZ and another appeal* [2020] SGCA 53 (CA SG) where it was held:

[81] This lack of express provision means that we cannot accept the CA 9 appellants' attempt to recast the statutory time bar objection as a jurisdictional one by asserting that there was no consent to arbitrating time-barred claims. *More importantly, a further reason why the CA 9 appellants cannot succeed is that if at all, this was a point they should have taken before the tribunal (see [49] above on raising jurisdictional objections in a timely manner). As noted by the judge at para [125], they did not pursue the time bar point as a jurisdictional objection though they were aware of this possibility, having mounted a different jurisdictional argument* relying on the condition precedent to resolve the dispute within 60 days by negotiation ... (Emphasis added.)

(f) the plaintiff in my view, simply cannot approbate and reprobate. This illuminating passage of the plaintiff's written submission in the arbitration, brought to my attention by the defendant's learned counsel is evocative of the plaintiff 'doth protest too much, methinks', (Shakespeare's Hamlet: Act 3, Scene 2):

A. PRELIMINARY ISSUE

1. To ascertain the applicable statutory law on limitation of action, viz

whether the Malaysian Limitation Act or the Indian Limitation Act applies. HOEC has not joined issue against the claimant on the applicable law of limitation being the Malaysian Limitation Act. Hence, HOEC has no submissions to make in this respect.

...

11. Whether any of the claims raised by the claimant are barred by statutory time limitation.

(i) In line with its submission in Issue A (1), HOEC has no submissions to make in this respect.

...

19. Whether any of the Claims raised by the Respondent are barred by statutory time limitation?

(i) It is submitted that none of the claims made by HOEC is barred by statutory time limitation.

(ii) Under the Limitation Act, 1953, as applicable to Malaysia, as relied upon by the claimant, insofar as counter claims are concerned, s 31 provides as follows:

> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

(iii) Therefore, it is clear that the counter claims raised by HOEC are not barred by statutory time limitation as they would be deemed to have been filed on the date on which the claim was submitted before this Hon'ble tribunal by the claimant.

(g) I am aware that the construction of the JOA in this case is a question of law to be determined by the tribunal, and it is not for the parties or their counsel to say what the document say or mean — *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known As Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101 (CA). *Silver Concept* was referred to by the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 where Jeffrey Tan FCJ, delivering the judgment of the court authoritatively said:

> [156] It must be more than settled that the construction of a document is a question of law. In *Munusamy v Public Services Commission* [1964] 1 MLJ 239, where on the construction of an art of the Constitution which forbids the dismissal or reduction in rank of certain persons unless a certain condition is complied with, that is that the person concerned be given a reasonable opportunity of being heard, Thomson LJ said 'That question of construction is a question of law ...'. In *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759, Yong Pung How CJ said 'we must approach the construction of the document, which is a question of law,

untrammelled by any concession as to the meaning of the agreement that might have been given by the court below'. 'It is trite that a question of construction is a question of law and not fact (see *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 1 WLR 1514 (HL), (*Bintulu Development Authority v Pilecon Engineering Bhd* [2007] 2 MLJ 610 per Nik Hashim JCA, as he then was, delivering the judgment of the court). In *Bahamas International Trust Co Ltd and another v Threadgold*, Lord Diplock said 'that the construction of a written document is a question of law', which was followed in *Tan Suan Heoh v Lim Teck Ming & Ors* [1987] 2 MLJ 466, *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38, *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101, *Padiberas Nasional Bhd v Kontena Nasional Bhd* [2010] 3 MLJ 134 and *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 and *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1). In *Desa Teck Guan Koko Sdn Bhd v Sykt Hap Foh Hing (suing as a firm)* [1994] 2 MLJ 246, Ian Chin J opined that ...

(h) as construction of the JOA is within the remit of the tribunal, I take the view that EVEN IF the majority of the tribunal had wrongly interpreted the JOA, it does not bring the matter within s 37 of the AA 2005 as this court is not entitled to substitute its own interpretation. In this regard, it is apposite to be reminded of the policy of minimal curial intervention reiterated by the Federal Court in *Jan De Nul*. Eight years before *Jan De Nul*'s case, minimal curial intervention was also emphasised by the same court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 where Richard Malanjum CJ (Sabah and Sarawak) as His Lordship then was, delivering judgment of the court tersely said:

> [53] And as Scrutton LJ put it '... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; *if you choose to go to Caesar you must take Caesar's judgment*' (see *African & Eastern (Malaya), Ltd v White, Palmer & Co, Ltd* (1930) 36 LI L REP 113 cited with approval by the Court of Appeal in *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 1 MLJ 178; [1996] 2 CLJ 249). (Emphasis added.)

[31] I am also of the respectful opinion that the plaintiff's contentions are in substance, an appeal on the merits of the applicable limitation laws decision. Attacking the merits has no nexus with s 37 of the AA 2005 and is only permissible under s 42 of the AA 2005 which was repealed in 2018 (following the Federal Court judgment in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1. The amendment brought Malaysia in tandem with other jurisdictions which do not permit referrals to court on a question of law arising from an award).

[32] The difference between s 37 and s 42 of the AA 2005 was explained by the Federal Court in *Jan De Nul* as follows:

> [64] ... Both these ss relate to different purposes and different tests for consideration. They are not the same. The consideration by the court in dealing with the applications under the sections varies. The cited test applicable in establishing an application under the s 42 may not be the same with and not applicable to an application under s 37 of the Act.
>
> [65] In drawing a clear distinction between ss 37 and 42 of the AA 2005, the Court of Appeal in *Petronas Penapisan*, made the following observation (with which we agree):
>
> > An application to set aside an award under s 37 largely deals with issues relating to the award making process and has nothing to do with error of facts and/or law on the face of record unless the exception applies; such as public policy. An application under s 42 has nothing to do with the award making process but has everything to do with the award per se and error of law on the face of record which error substantially affects the rights of one or more of the parties. The distinction between ss 37 and 42 is that like of an apple and an orange.

[33] The case of *BBA and others v BAZ and another appeal* does not advance the plaintiff's case one whit. Far from it. In this case, the Singapore Court of Appeal in fact held that:

(a) the issue of time-bar could not be reviewed *de novo* by a Singapore court in setting aside applications — at para [73];

(b)

(i) it was Singapore law, as the *lex arbitri* as well as the law of the seat court, that governed the question of whether limitation should be classified as going towards jurisdiction or admissibility ('the classification question');

(ii) under Singapore law, issues of time bar arising from statutory limitation periods went towards admissibility — at para [64];

(c) Singapore law governs the classification question since it is the law of the *lex arbitri* and of the seat court — at paras [65]–[66];

(d) matters regarding admissibility (ie whether it is appropriate for the tribunal to hear a case) are for the tribunal to decide, while matters regarding jurisdiction (ie the power of the tribunal to hear the case) are for the court to decide — at paras [73]–[74];

(e) the Court of Appeal rejected the appellants' argument that Indian law as the governing law should be taken into account in determining the classification question. It held that the parties' choice of Singapore as the seat of the arbitration (despite the strong connection of the transaction

to India) also meant and included the choice of the seat's laws to govern the classification question independently of their choice of Indian law as the governing law — at para [66];

(f) finally, the Court of Appeal held that under Singapore law, *issues of time bar which arise from the expiry of statutory limitation periods go towards admissibility, not jurisdiction* — at [73], [80]–[82];

(g) the 'tribunal versus claim' test underpinned by a consent-based analysis should apply for purposes of distinguishing whether an issue went towards jurisdiction or admissibility. The 'tribunal versus claim' test asked whether the objection was targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself was defective and should not be raised at all). In the former case the objection would go towards jurisdiction, and in the latter case, towards admissibility. Consent served as the touchstone for whether an objection was jurisdictional because arbitration was a consensual dispute resolution process — at paras [76], [77] and [78];

(h) applying the 'tribunal versus claim' test, issues of time bar which arose from the expiry of statutory limitation periods went towards admissibility as they attacked the claim. It made no difference whether the applicable statute of limitations was classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense. In both cases the complaint was that the claim was stale and therefore defective, and not — barring express provision in the arbitration clause — that the bringing of claims that were out of time under limitation laws fell outside the scope of consent to arbitration — at para [80]; and

(i) since there was no express provision regarding statutory time bars in the arbitration clause in the SPA, the Court of Appeal rejected the CA 9 appellants' attempt to recast the statutory time bar objection as a jurisdictional one by asserting that there was no consent to the bringing of time-barred claims to arbitration. The CA 9 appellants' contention was also rejected because they had not pursued the time bar point as a jurisdictional objection in the arbitration despite being aware of this possibility — at para [81].

[34] As I am not aware of any Malaysian case on this point, I will follow the approach of the Singapore Court of Appeal in *BBA and others v BAZ and another appeal* and hold that the majority of the tribunal's decision on the applicable limitation laws goes to the admissibility of the claim, and is not a jurisdictional error. This ground of challenge falls.

COSTS CHARGEABLE TO JOINT ACCOUNT DECISION AND SAMSON AWARD DECISION

[35] The plaintiff contended that:

(a) the majority of the tribunal's decision to apply Malaysian limitation laws to find that no part of the defendant's claims were time-barred had a material impact on the other parts of the award as a large part of the defendant's claims for costs chargeable to joint account were for expenses allegedly incurred more than three years before the commencement of the arbitration on 17 March 2017 — whilst the Samson award claims, being claims relating to charter hire up to 31 December 2012 would both have fallen into the category of claims barred by limitation under the Indian Limitation Act 1963;

(b) article II of Appendix A to the JOA did not create a distinct and separate class of expenditure that could enable the defendant to recover the costs charged by the defendant to the joint account for joint operations if such costs were not incurred in accordance with an annual work programme and budget approved by the Management Committee;

(c) the majority of the tribunal incorrectly interpreted article 4.8 and article II of Appendix A to the JOA and in making costs chargeable to 'joint account' decision, the majority of the tribunal re-wrote the JOA by adding an additional term and in doing so, exceeded the limits of their mandate/authority and made a decision beyond the scope of the submission under s 37(1)(a)(v) of the AA 2005;

(d) the majority of the tribunal, by the Samson award decision awarded that the other 'contractors' separately pay the defendant the amounts awarded against it in the Samson award under the indemnity provisions of article 4.10 of the JOA and in so doing, had exceeded the limits of their mandate/authority when it found, as a matter of fact, that the defendant had not paid out on the same; and

(e) the costs chargeable to joint account decision and the Samson award decision contravene s 30(5) of the AA 2005 and/or is contrary to the public policy of Malaysia.

[36] The defendant countered as follows:

(a) the costs chargeable to joint account decision and the Samson award decision are respectively responses to the paras 2–6 and para 9 of the amended memorandum of issues in the arbitration; in para 9.1 of the plaintiff's affidavit in reply, the plaintiff has admitted that the issues culminating in these two decisions were submitted to the tribunal for determination;

(b) in the circumstances, the plaintiff has no basis to rely on s 37(1)(a)(v) of the AA 2005 to argue that the costs chargeable to joint account decision was a decision on matters beyond the scope of the submission to the arbitration;

(c) an objection regarding the majority of the tribunal's contractual interpretation of the JOA does not engage this honourable court's intervention under s 37(1)(a)(v) of the AA 2005, even if the majority of the tribunal's contractual interpretation was incorrect;

(d) even if the majority of the tribunal's contractual interpretation was wrong, the costs chargeable to joint account decision is not in conflict with the public policy of Malaysia — *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213 (FC) at para 54, *Allianz General Insurance Company v Virginia Surety Company Labuan Branch* [2020] MLJU 331; [2020] 5 CLJ 345 (HC) at paras 32 and 58; *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & Another Case* [2016] 4 CLJ 927 (HC) at paras 43–47; and

(e) both the costs chargeable to joint account decision and Samson award decision were correct.

THE COURT'S FINDINGS

[37] For the same reasons as set out in paras 30(a) to 30(d) and 31 above, I find these two complaints have no teeth. I also accept the defendant's submissions in this regard. These complaints concern issues submitted for determination by the tribunal. The majority tribunal in arriving at these decisions arising from interpretation of the JOA even if erroneous do not bring the complaints within s 37 of the AA 2005. Neither does this court sit as an appellate court to review the merits of the two decisions.

THE RECONCILIATION DECISION

[38] To put the matter in perspective, article 6 of the JOA sets out the procedure to enable the defendant as operator to debit from the joint account, claims made against the other parties as respondents in the arbitration. It contemplates that when there is an approved work programme and budget, the operator may raise an Authorisation Expenditure Request ('AER') for approval by the respondents. Approval is deemed given if a party fails to respond. The operator is entitled to make Cash Call sums not exceeding the AERs. The respondents argued that the defendant had bypassed this procedure and had made Cash Calls without AER. Therefore, the defendant was not entitled to make those Cash Calls. The respondents also contended that they had paid excess Cash Calls to the defendant which was denied by the defendant.

[39] After deciding the issue of liability against the respondents in the arbitration, the majority of the tribunal eventually decided in the majority award that this issue could only be determined upon reconciling the amounts found due by the respondents and apportioned in accordance with their respective participating interest and that any party who has made excess cash advances should be credited. In this regard, the majority of the tribunal directed that the parties to the arbitration shall undertake a reconciliation of their cash contributions made and the expenditures incurred as from 1 August 2011 (the reconciliation decision).

[40] In coming to the reconciliation decision, the majority of the tribunal directed the parties to take into account all the findings made in the majority award, and specifically on the following issues:

(a) the respective liabilities of the respondents for their share of the expenditures ruled as recoverable by the claimant;

(b) the figures of expenditures as per the audited accounts from financial years 2011 to 2017;

(c) to account for the application of the Cash Calls made by each of the respondents; and

(d) interest accruals.

[41] The majority of the tribunal also stated that if there remain any further areas of disagreement, the tribunal would hear the parties to the arbitration further and make a further award on the disputed account.

[42] The plaintiff complained that it was not 'forewarned' of the possibility of the reconciliation decision and therefore, the plaintiff was not given the opportunity to address the majority of the tribunal on the same; and, that the reconciliation decision is 'contrary to the public policy of Malaysia and was made in breach of natural justice' and relied on ss 37(1)(a)(iii), 37(1)(b)(ii) and 37(2)(b) of the AA 2005.

[43] Conversely, the defendant asserted that the plaintiff's attempt to seek the court's intervention in a decision of this nature is wholly misconceived; there is no breach of natural justice or infringement of public policy:

(a) the tribunal did not foreclose itself from issuing a further award if the parties are unable to come to an agreement in respect of the reconciliation. This is also expressly provided for at para VI of the dispositive of the majority award;

(b) if there is disagreement, the plaintiff will be given an opportunity to present any further arguments the plaintiff may have in relation to the issue of whether the defendant made any excess Cash Calls against the plaintiff;

(c) it is not at all uncommon, even in court proceedings, for directions to be given for the parties to attempt to agree on certain matters;

(d) even if there has been a breach of natural justice by the making of the reconciliation decision (which is denied), it is submitted that the reconciliation decision should not be set aside. Any breach of natural justice by the making of the reconciliation decision (which is denied) would be immaterial and would not have affected the outcome of the majority award and cited in support:

(i) *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* (FC) at para 53:

> [53] In the light of the above, we think that *the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows*:
>
> First, the court must consider (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;
>
> Second, *the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;*
>
> *Third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;*
>
> *Fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;*
>
> Fifth, where the breach is significant and might have affected the outcome, the award may be set aside;
>
> Sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
>
> *Seventh, the discretion given to the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court* and
>
> Eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice. (Emphasis added.)

(ii) *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal*

[2021] 1 MLJ 1; [2020] 9 CLJ 466 (FC) where it was held at paras 139–140 that:

> [139] *Like any other exercise of discretion, the discretion to set aside an award for breach of the rules of natural justice must be exercised judiciously and only when it is just to do so. The authorities are clear that in considering whether the discretion should be exercised, the court must undertake an evaluation of relevant factors such as those identified in Kyburn, amongst which would be the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration and leaving room for 'casual breach or occasional error'. Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in the evaluation process.*
>
> [140] *Kyburn* explained the position in the following terms:
>
> *... a finding of a breach of the rules of natural justice does not mean that the arbitral award must be set aside, that the power of the court to set aside an award is discretionary and will not be exercised automatically in every case. The discretion enables the court to evaluate the nature and impact of the particular breach in deciding whether the award should be set aside, the policy of encouraging arbitral finality will dissuade the court from exercising discretion when the breach is relatively immaterial or was not likely to have affected the outcome.* (Emphasis added.)

(e) the high threshold before the reconciliation decision can be said to be in conflict with the public policy of Malaysia under s 37(1)(b)(ii) of the Arbitration Act 2005 is not met — *Jan De Nul (Malaysia) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* (FC) at paras 53 and 55; *Allianz General Insurance Company v Virginia Surety Company Labuan Branch* [2020] MLJU 331; [2020] 5 CLJ 345 (HC) at para 39.

THE COURT'S FINDING

[44] In dealing with this complaint, I am guided by the approach in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86, where the Singapore Court of Appeal in dealing with the argument of a breach of natural justice raised in an attempt to set aside an arbitral award explained at p 119 as follows:

> It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrators, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without appraising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled — indeed, it is his obligation, to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged

upon him by parties, neither is he expected to consult the parties on his thinking process before finalising the award unless it involves a dramatic departure from what has been presented to him.

Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied. (Emphasis added.)

[45] On this complaint, learned counsel for the defendant politely called it 'remarkable'. Having weighed the matter, particularly when the majority of the tribunal had expressly stated that it would hear the parties to the arbitration further if parties were unable to reach agreement, in which event, to me, it is plainly still very much a live issue — the plaintiff will have every opportunity to present its case. As such, I do not see how the plaintiff can be said to be seriously or materially impacted or that the fundamental rule of natural justice as expressed in the Latin maxim *audi alteram partem* was infringed. In this respect, I agree with the submissions of the defendant that from a plain reading of case law such as *Jan De Nul* particularly at para [58], and the eight factors set out in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213 (FC) at para [53], the high threshold for breach of public policy is not met. In exercising a judicial discretion, the court can temper logic with the prospect that a slight breach (even if one assumes there is any) of the rules of natural justice ought not to infect the whole majority award of the majority of the tribunal; particularly when it seems abundantly clear to me on the facts, the breach (if any), is not material at all.

[46] Whilst the plaintiff has urged upon the court not to 'rubberstamp' the sward of the majority of the tribunal, this court in not wearing blinkers, would also hasten to add that the plaintiff has to show its complaints come within s 37 of the AA 2005. I am duty bound and in fact stare decisis demands that I observe the decision of the Federal Court in *Sigur Rus* which went on to state that the court's discretion to set aside an award under s 37(1) must be exercised with regard to the policies and objectives underpinning the AA 2005 and even if there is a breach of natural justice, setting aside is not automatic:

[59] Although the *court's discretion* to set aside an award under s 37(1) is unfettered, it must nevertheless *be exercised with regard to the policies and objectives underpinning the AA 2005*. In particular, due cognizanse must be taken of the purposes of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards.

...

[63] Because s 37 vests the court with a wide discretion on whether to set aside an award, we agree with the learned JC that *the decision to set aside an award is not an*

automatic outcome of a finding that there has been a breach of the rules of natural justice. The court will still have to evaluate whether discretion should be exercised in the applicant's favour. In considering whether discretion should be exercised, there should be an evaluation of relevant factors such as those identified in *Kyburn Investments Ltd v Beca Corporate Holdings Ltd*, amongst which would be to consider the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration; leaving room for 'casual breach or occasional error'. Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in that evaluation. (Emphasis added.)

[47] In the round, I find that the whole core and sinew of the plaintiff's complaints are not contemplated by s 37 of the AA 2005. It is trite that the court does not usurp the position of the arbitrator in determining the merits of the dispute. It ought to be patently clear on such a scrutiny of the award that the dispute fell outside the scope of the submission warranting the intervention of the court — *Huawei Technologies*, the correct test being:

[45] ... Thus, the issue examined by the courts is not whether the decision reached by the arbitral tribunal is well-founded or even how the arbitral tribunal has reached its decisions, but merely whether this decision transgresses the scope of the arbitrators' jurisdiction or mandate. In other words, the court must limit its investigations to what is strictly necessary for the interpretation of the scope of the arbitration agreement and the arbitrators' mandate.

[48] Errors of law or lack of appreciation of facts as such are not a consideration for a setting aside application or ground to refuse recognition — *Huawei Technologies*.

[49] In my utmost respectful view, the majority of the tribunal did not err in law in rendering the majority award. At risk of repetition, even IF it did err in law, it is not a ground for setting aside.

[50] In *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal* [2018] 4 MLJ 799, the Court of Appeal stated:

[19] ...

(a) section 36 will fortify the argument that the award is final and binding on the parties. section 36 provision is not found in the model law. section 36 places a higher threshold on the court when it intends to set aside an award related to a section 37 application. In this respect, the decision from other jurisdiction which does not have a similar provision will not be helpful, save those cases which had dealt with the jurisprudence relating to 'patent injustice' or unconscionability, etc. section 36 of the Act reads as follows:

36 An award is final and binding

(1) An award made by an arbitral tribunal pursuant to an arbitration

A agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.

(2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

B

[51] In my judgment, the plaintiff is not entitled to relitigate the matter. The grounds of challenge raised would not succeed.

C

[52] In the final analysis, reading the majority award generously in consonance with *Soh Beng Tee*, I am of the utmost respectful view that the matters dealt with in the majority award are matters well within the domain of the tribunal and that they are not grounds to be raised in an application to set aside the majority award. Even if, assuming the plaintiff's complaints are made out on breach of public policy or natural justice during the arbitral proceedings or in connection with the making of the majority award, this court nevertheless, has a discretion not to set aside an award under s 37(1) of the AA 2005. This is clear from the use of the permissive word 'may' in s 37(1) of the AA 2005.

D

E

[53] For all these reasons, I dismissed the OS with costs.

[54] I must not conclude without recording my appreciation to the parties' respective counsel. I ought to commend them for the enormous efforts expended and for the scholarship in preparing the comprehensive submissions which were of tremendous assistance to the court in arriving at a decision on the points covered in this judgment. My not addressing here each and every single argument and case authority submitted by the parties is not meant as a discourtesy but to avoid a lengthy judgment.

F

G

Originating summons dismissed.

Reported by Ashok Kumar

H

I